Supreme Court, U.S.
FILED
APR 20 2007
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No. 06-061415

IN THE

Supreme Court of the United States

JESUS DE LA PAZ SANCHEZ,
Petitioner,

v.

ALBERTO R. GONZALES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 12, 2007

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QUESTIONS PRESENTED

Whether a Texas conviction for unauthorized use of a motor vehicle is a crime of violence under 18 U.S.C. § 16(b)?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1, the following list identifies all of the parties appearing here and in the court below.

The Petitioner here and in the United States Court of Appeals for the Fifth Circuit is Jesus De La Paz Sanchez, a citizen of Mexico.

The Respondent here and in the United States Court of Appeals for the Fifth Circuit is Alberto R. Gonzales, U.S. Attorney General.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

Mr. Jesus De La Paz Sanchez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

IN THE

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No. 06-__

JESUS DE LA PAZ SANCHEZ,
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PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the court of appeals is reported at 473 F.3d 133.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUORY LAW PROVISIONS

The relevant statutory provision involved reads as follows:

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. 18 U.S.C. § 16 (2006).

STATEMENT

1. Petitioner Sanchez was admitted to the United States as a lawful permanent resident on July 18, 1985.

2. Petitioner Sanchez pled guilty to the offense of Unauthorized Use of a Motor Vehicle in Harris County, Texas. He was sentenced to three years deferred adjudication on May 14, 1993.

3. On May 23, 1996, Petitioner Sanchez was found guilty and sentenced to a one-year term of imprisonment for Unauthorized Use of a Motor Vehicle.

4. On February 21, 2003, the immigration court (Zimmer, J.) ordered Petitioner Sanchez removed from the United States pursuant to 237(a)(2)(A)(ii) of the Immigration and Nationality Act ("INA"). The court held that Petitioner Sanchez's conviction was an aggravated felony under INA § 101(a)(43) pursuant to *United States v. Galvan-Rodriguez*, 169 F.3d 217 (5th Cir. 1999).

5. Petitioner Sanchez filed for appeal of the immigration court's decision with the Board of Immigration Appeals. On September 1, 2004, the Board dismissed the appeal on the grounds the immigration court did not err in its decision.

6. Petitioner Sanchez filed a petition for review with the court of appeals. On November 15, 2006, the court of appeals found Petitioner Sanchez ineligible for INA § 212(c) relief and denied the petition for review.[1]

---

[1] Jurisdiction lies with the Court of Appeals for the Fifth Circuit pursuant to the REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231, 302-11 (May 11, 2005).

REASONS FOR GRANTING THE PETITION

The Court of Appeals for the Fifth Circuit incorrectly decided *United States v. Galvan-Rodriguez*. The criminal offense of Unauthorized Use of a Motor Vehicle does not involve a substantial risk of physical force against the property of another in the commission of a felony.

In *Galvan-Rodriguez*, the defendant-appellant was convicted of illegal reentry following deportation for an aggravated felony. *Id.* at 218. Galvan had been convicted of unauthorized use of a motor vehicle. *Id.* Galvan appealed the district court's holding that his conviction for unauthorized use of a motor vehicle constituted a crime of violence, and therefore an aggravated felony. *Id.* In upholding the lower court's decision, the Fifth Circuit stated that the unauthorized use of a vehicle carries a strong probability that physical force will occur. *Id.* at 219.

However, in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), this Court held the "substantial risk" element of 18 U.S.C. § 16(b) refers to the risk that physical force may be required while committing the crime. *Id.* at 8. This Court explained that mere negligence or reckless conduct is not sufficient. "The substantial risk in § 16(b) relates to the use of force, not to the possible effect of a person's conduct." *Id.* at 10. Accordingly, the risk that physical force may have occurred due to Petitioner Sanchez's reckless or negligent conduct in the commission of the offense does not constitute a "substantial risk" pursuant to 8 U.S.C. § 16(b).

The *Galvan* court erred in classifying the unauthorized use of a motor vehicle as a crime of violence, and therefore an aggravated felony. The court relied too heavily on its comparison of burglary of a vehicle and unauthorized use of a vehicle. *Galvan-Rodriguez*, 169 F.3d at 219. Burglary of a vehicle necessarily involves a "substantial probability" that physical force will be used to carryout the offense. *Id.* The

"substantial risk" found in burglary offenses is distinguishable from the risk present during the unauthorized use of a vehicle. The risk that damage may accidentally occur to the vehicle during the commission of the offense is not an intentional use of force. This Court stressed that "substantial risk" referred to the use of force and not merely the injuries or damage resulting from a person's conduct. *Leocal*, 543 U.S. at 9-10.

Therefore, the Unauthorized Use of a Motor Vehicle is not a crime of violence under 18 U.S.C. § 16(b).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Suite 500
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February 12, 2007

APPENDIX

APPENDIX A

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT, HOUSTON, TEXAS

CASE NO. A39 718 293

IN THE MATTER OF: De La Paz-Sanchez, Jesus

X RESPONDENT __ APPLICANT
__ DEPORTATION PROCEEDINGS
__ EXCLUSION PROCEEDINGS
__ REMOVAL PROCEEDINGS

MOTION DECISION

Gino M. Mesa, Esquire
Attorney/Representative

Merilee Fong
Assistant District Counsel
Houston, Texas

__ PRO SE

A Motion To "Pretermit" has been filed in the above numbered and styled case on February 6, 2003. The Motion has been carefully considered and it appears that:

X The Motion is timely and reasonable. Therefore, IT IS ORDERED that the Motion be *GRANTED*, and the respondent's application for a waiver under former section 212(c) of tae Immigration and Nationality Act is *DENIED*.

X IT IS FURTHER ORDERED that the respondent be removed to Mexico under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act for the reasons stated in the November 2, 2000 decision of the Immigration Judge and the July 16, 2002 and September 10, 2002 decisions

of the Board of Immigration Appeals, and the reasons set forth in this motion decision.

X See attached.

/s/ William K. Zimmer
WILLIAM K. ZIMMER
Immigration Judge
Date: February 21, 2003

On May 14, 1993, the 337th District Court of Harris County, Texas deferred adjudication of guilt relating to the respondent's Unauthorized Use of a Vehicle offense (committed November 29, 1992) and imposed a three period of probation. The above named criminal court adjudicated the respondent's guilt on May 23, 1996 and imposed a one-year sentence.

The United States Supreme Court held that "212(e) relief remains available for aliens . . . whose convictions were obtained through plea agreements and who would have been eligible for 212(c) relief at the time of their plea under the law then in effect." *INS v. St. Cyr*, 121 S.Ct. 2271 (2001). This holding presumes an alien relied on the availability of a waiver under section 212(c) of the Immigration and Nationality Act (the Act) if such waiver was available at the time of the plea.

The respondent asserts that he was eligible for a 212(c) waiver at the time of his May 14, 1993 guilty plea because he was not removable at that time. This assertion ignores absence of an exclusion ground based on Unauthorized Use of a Vehicle under the law existing on May 14, 1993 or at any other time.

Whether or not the criminal court disposition in an alien's criminal proceedings could have been properly classified as a conviction (a classification subject to various changing interpretations); whether or not the Service would initiate proceedings; or whether the respondent was subject to deportation at

the time of his plea is not the basis for the *St. Cyr* presumption and does not affect the availability of the 212(c) waiver. The sole basis, for the *St. Cyr* presumption is whether the respondent "would have been eligible for 212(c) relief at the time of the plea under the law then in effect" and nothing more. Whether or not the respondent was deportable or excludable at the time of the plea (a factor subject to changes in law and shifting court interpretations) is not affect the availability of the *St. Cyr* presumption.

Therefore, the respondent's argument that is eligible for a 212(c) waiver because he was not subject to deportation at the time of his May 14, 1993 guilty plea must be rejected.

The waiver under former section 212(c) of Act applies to the ground of deportation and not the underlying offense. *Matter of Granados*, 16 I&N Dec. 726 (BIA 1979), aff d, 624 F.2d 191 (9th Cir. 1980); *Matter of Wadud*, 19 I&N Dec. 182 (1984); *Matter of Hernadez-Casillas*, 20 I&N Dec. 262 (BIA 1990); *Matter of Montenegro*, 20 I&N Dec. 603 (BIA 1992); *Matter of Chow*, 20 I&N Dec. 647 (BIA 1993), aff d, 9 F.3d 1547 (5th Cir. 1993); *Matter of Esposito*, 21 I&N Dec. I (BIA 1995). The Board of Immigration Appeals (the Board) carved out an exception to this general rule, which is limited to the aggravated felony deportation ground. *Matter of Meza*, 20 I&N Dec. 257 (BIA 1991). The Board described this exception as follows:

> This Board's decision in *Matter of Meza,* 20 I&N Dec. 257 (BIA 1991), is limited to the question of eligibility for section 212(c) relief in the case of a conviction for a drug-trafficking aggravated felony and is based on the specific amendment to sectio.. 212(c) regarding aggravated felonies.

Matter of Esposito, supra, at 9.

The respondent's November 29, 1992 Unauthorized Use of a Vehicle offense is an aggavated felony under section

101(a)(43) of the Act. *United States v. Galvan-Rodriguez*, 169 F.3d 217 (5th Cir. 1999). Based on the aggravated felony classification of the respondent's offense, the application of *Matter of Meza* cannot be ruled out. However, Unauthorized Use of a Vehicle cannot be classified as a crime involving moral turpitude or a drug crime or any other crime for which a parallel ground of exclusion exists. There is no parallel ground of exclusion under section 212(a)(2) of the Act relating to the respondent's aggravated felony offense of Unauthorized Use of a Vehicle. Therefore, the respondent is not eligible to apply for a waiver under section 212(c) of the Act as a matter of law.

APPENDIX B

U.S. Department of Justice
Executive Office for
Immigration Review
Falls Church, Virginia 22041

Decision of Board of
Immigration Appeals

File: A39 718 293 – Houston

Date:

In re: JESUS DE LA PAZ SANCHEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Gino M. Mesa, Esquire

ON BEHALF OF DHS: Gerrie Zhang
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Relief under section 212(c)

ORDER:

PER CURIAM. The respondent appeals from the Immigration Judge's February 21, 2003, decision, which found the respondent ineligible for a waiver under section 212(c) of the Act, 8 U.S.C. § 1182(c). We are not persuaded that the Immigration Judge erred in finding that the respondent's unauthorized use of a vehicle offense was an aggravated felony under controlling law, but was not a crime involving moral turpitude. As such, we agree with the Immigration Judge that there is no parallel ground of exclusion, i.e., if the respondent was seeking entry into the United States, he would not be subject to exclusion based on this offense. That being the case, we do not find that the Immigration Judge erred in ruling that the respondent was not eligible to apply for a waiver under section 212(c) of the prior aw. Accordingly, the appeal is dismissed.

/s/ [Illegible]
FOR THE BOARD

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed November 15, 2006]

No. 05-60973
Summary Calendar

JESUS DE LA PAZ SANCHEZ,
Petitioner,

versus

ALBERTO R. GONZALES, U.S. Attorney General,
Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals

Before DeMOSS, STEWART and PRADO, *Circuit Judges.*

PER CURIAM:

Jesus De La Paz Sanchez (Sanchez) petitions for review of an order by the Board of Immigration Appeals (BIA). Sanchez contends that the BIA erred when it found him removable based on his Texas conviction for unauthorized use of a motor vehicle (UUMV). Sanchez contends that his UUMV offense was not an aggravated felony because it does not constitute a crime of violence under 18 U.S.C. § 16(b). He also asserts that the BIA erred when it denied his request for a waver of removal under former § 212(c) of Immigration and Nationality Act (INA), 8 U.S.C. § 1182(c).

As a threshold matter, we have jurisdiction to review Sanchez's constitutional claims and questions of law pursu-

ant to the REAL ID Act.[1] *See* 8 U.S.C. § 1252(a)(2)(D); *Hernandez-Castillo v. Moore*, 436 F.3d 516, 518 (5th Cir. 2006), *cert. denied*, 2006 WL 849672 (U.S. Oct. 2, 2006) (No. 05-1251). The BIA's factual findings are reviewed for substantial evidence. *See Chun v. INS*, 40 F.3d 76, 78 (5th Cir. 1994). The substantial evidence standard requires that the decision be based on the evidence presented and that the decision be substantially reasonable. *Carbajal-Gonzalez v. INS*, 78 F.3d 194, 197 (5th Cir. 1996). Although questions of law are reviewed de novo, courts should defer to the BIA's interpretations of statutes and regulations that the BIA administers. *Fonseca-Leite v. INS*, 961 F.2d 60, 62 (5th Cir. 1992).

Sanchez's argument that Texas's UUMV offense does not constitute a crime of violence under 18 U.S.C. § 16(b) is foreclosed by *United States v. Galvan-Rodriguez*, 169 F.3d 217, 219 (5th Cir. 1999). *See also In re Brieva-Perez*, 23 I. & N. Dec. 766, 767-70 (BIA 2005) (Texas UUMV conviction was a crime of violence under § 16(b) and therefore an aggravated felony). Our decision in *United States v. Charles*, 301 F.3d 309, 314 (5th Cir. 2002) (en banc), expressly limited *Galvan-Rodriquez*'s holding to its property aspects and to § 16(b) cases; thus *Galvan-Rodriquez* remains applicable to Sanchez.

We also reject Sanchez's argument that he is entitled to seek discretionary relief pursuant to former § 212(c) of the INA. Deportable aliens are eligible for relief under § 212(c) only if their offenses have a statutory counterpart in § 101(a)(43)(F) of the INA, 8 U.S.C. § 1101(a)(43)(F). *Brieva-Perez*, 23 I. & N. Dec. at 771-73. Sanchez was ordered removed as an aggravated felon who had committed a crime of violence. There is no comparable crime-of-violence ground of excludability. *Id.* Sanchez is therefore ineligible for § 212(c) relief. Sanchez's petition for review is DENIED.

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[1] REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231, 302-11 (May 11, 2005).

APPENDIX D

[LOGO]
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U.S. Code collection

TITLE 18 > PART I > CHAPTER 1 > § 16
§ 16. Crime of violence defined

How Current is This?

The term "crime of violence" means—

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

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APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-50901

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RODRIGO GALVAN-RODRIGUEZ,
Defendant-Appellant.

March 4, 1999, Decided

OPINION

PER CURIAM:

The sole issue in this appeal is whether, by its nature, the offense of unauthorized use of a motor vehicle qualifies as a crime of violence under 18 U.S.C. § 16. Defendant-Appellant Rodrigo Galvan-Rodruiguez ("Galvan") challenges the district court's holding that his prior conviction for unauthorized use of a motor vehicle is a crime of violence, and therefore an "aggravated felony," for purposes of enhancing his sentence for illegal entry and reentry into the United States by I6 levels pursuant to § 2L1.2(b)(2) of the United States Sentencing Guidelines ("U.S.S.G." or "the Guidelines"). Concluding that unauthorized use of a motor vehicle is a crime of violence, thereby justifying a 16 level enhancement, we affirm Galvan's sentence.

I.

FACTS AND PROCEEDING

Defendant-Appellant Galvan was charged with illegal entry into the United States and reentry following deportation, in violation of 8 U.S.C. §§ 1325 and 1326, respectively. Galvan entered pleas of guilty, and a pre-sentence report (PSR) followed. Pursuant to U.S.S.G. 2L1.2,, the guideline applied to defendants who are convicted of unlawfully entering, re-entering, or remaining in the United States, the probation officer recommended that Galvan's base offense level of eight be increased by 16 levels, to 24, because he had been deported following conviction of an aggravated felony, to wit: unauthorized use of a motor vehicle. Additionally, Galvan was afforded a three level decrease for acceptance of responsibility, producing an offense level of 21.

Galvan objected to the PSR, contending that unauthorized use of a motor vehicle was not an aggravated felony warranting a 16 level enhancement. The district court overruled his objection. Based on Galvan's offense level of 21 and a criminal history category of V, the appropriate range of imprisonment was 70 to 87 months. Acting on its own, however, the district court departed downwardly by two levels, to 19, and sentenced Galvan to 60 months of imprisonment. Galvan timely appealed.

II.

ANALYSIS

Galvan argues that the district court erred by assessing the 16 level aggravated felony enhancement under U.S.S.G. § 2L1.2(b)(2). He insists that unauthorized use of a motor vehicle is not a crime of violence as defined by 18 U.S.C. § 16.

An appellant's sentence must be affirmed unless it was imposed in violation of the law or was based on an erroneous

application of the sentencing guidelines.[1] We review a challenge to the district court's interpretation of the Guidelines de novo.[2]

According to US.S.G. § 2L1.2, when a defendant has been deported and unlawfully reenters the United States, his offense level will be increased by I6 levels if he had been previously convicted of an "aggravated felony,"[3] Application note seven following § 2LI.2 defines "aggravated felony" as "any crime of violence (as defined in 18 U.S.C. § 16, not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least five years."[4] A "crime of violence" is:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.[5]

The phrase "by its nature" in subsection (b) requires courts to employ a categorical approach—without examining the underlying facts surrounding the conviction—in determining whether an offense constitutes a crime of violence.[6]

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[1] *United States v. Velazquez-Overa*, 100 F.3d 418, 419 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1283 (1997).

[2] *Id.* at 420.

[3] *United States Sentencing Commission, Guidelines Manual*, § 2L1 .2(b)(2) (Nov. 1996).

[4] US.S.G. § 2L1.2, comment n.7. Galvan was sentenced to five years deferred adjudication for his conviction of unauthorized use of a motor vehicle.

[5] 18 U.S.C. § 16 (1994) (emphasis added).

[6] *Velazquez-Overa*, 100 F.3d at 421 ("A sentencing court need only consider the fact that [the defendant] was convicted and the inherent nature of the offense.").

On three separate occasions, we have examined specific offenses under the rubric of subsection (b)—applicable to offenses that involve a substantial risk that physical force may ensue. We have held that indecency with a child,[7] burglary of a habitation,[8] and burglary of a nonresidential structure or vehicle[9] each involve a substantial probability that physical force on the person or property will occur, thereby warranting a 16 level sentence enhancement under § 2L1.2(b)(2). Whether the offense of unauthorized use of a motor vehicle qualifies as a crime of violence, however, is a res nova issue in this circuit. Concluding that the risks of physical force being exerted during the commission of the burglary of a vehicle are substantially similar to the risks of such force occurring while operating a vehicle without the owner's consent, we hold that the offense of unauthorized use of motor vehicle is a crime of violence within the intendment of 18 U.S.C. § 16.

We have recognized that when analyzing the operative phrase "substantial risk," it is not necessary that "[the risk] must occur in every instance; rather a substantial risk requires a strong probability that the event, in this case the application of physical force during the commission of the crime, will occur."[10] The elements of burglary of a vehicle are analogous to the elements of unauthorized use of a motor vehicle except that the additional element, "intent to commit a felony or theft," is needed to sustain a burglary conviction. Just as burglary of a vehicle involves a substantial risk that property might be damaged or destroyed in the commission of the offense, the

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[7] *Id* at 419.

[8] *United States v. Guadardo*, 40 F.3d 102, 103-04 (5th Cir. 1994).

[9] *United States v. Ramos-Garcia*, 95 F.3d 369, 371 (5th Cir. 1996), cert. denied, 117 S. CL 751 (1997); *United States v. Rodriguez-Guzman*, 56 1473d 18, 20 (5th Cir 1995).

[10] *Rodriguez-Guzman*, 56 F.3d at 20 (emphasis added).

unauthorized use of a vehicle likewise carries a substantial risk that the vehicle might be broken into, "stripped," or vandalized, or that it might become involved in an accident, resulting not only in damage to the vehicle and other property, but in personal injuries to innocent victims as well.[11]

It is true that, as argued by Galvan, the unauthorized use of a vehicle will not always result in physical force to persons or property, as, for example, when a child takes the family car "joyriding" without parental consent; however, there is a strong probability that the inexperienced or untrustworthy driver who has no pride of ownership in the vehicle will be involved in or will cause a traffic accident or expose the car to stripping or vandalism. In fact, when an illegal alien operates a vehicle without consent, a strong probability exists that the alien may try to evade the authorities by precipitating a high-speed car chase and thereby risking the lives of others, not to mention significant damage to the vehicle and other property. As we perceive these risks to be substantial, Galvan's offense qualifies as a crime of violence and thus warrants a I6 level sentence enhancement.

III.

CONCLUSION

For the aforementioned reasons, we hold that the unauthorized use of a motor vehicle, by its nature, qualifies as a crime of violence under 18 U.S.C. 16. Accordingly, the district court properly assessed the 16 level aggravated felony enhancement under § 2LI.2(b)(2). The judgment of the district court is therefore, in all respects,

AFFIRMED.

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[11] See e.g., *Coleman v. State*, 802 S.W.2d 394, 395 (Tx. Ct. App. 1990) (conviction for unauthorized use of a motor vehicle supported by evidence of shattered glass from driver's side window and ignition wires ripped out of steering column).

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. 03-583

JOSUE LEOCAL,

Petitioner,

v.

JOHN D. ASHCROFT, Attorney General, et al.

October 12, 2004, Argued
November 9, 2004, Decided

OPINION

Chief Justice Rehnquist delivered the opinion of the Court.

Petitioner Josue Leocal, a Haitian citizen who is a lawful permanent resident of the United States, was convicted in 2000 of driving under the influence of alcohol (DUI) and causing serious bodily injury, in violation of Florida law. *See* Fla. Stat. § 316.193(3)(c)(2) (2003). Classifying this conviction as a "crime of violence" under 18 U.S.C. § 16 [18 USCS § 16], and therefore an "aggravated felony" under the *Immigration and Nationality Act* (INA), an Immigration Judge and the Board of Immigration Appeals (BLA) ordered that petitioner be deported pursuant to § 237(a) of the INA. The Court of Appeals for the Eleventh Circuit agreed, dismissing petitioners petition for review. We disagree and hold that petitioner's DUI conviction is not a crime of violence under 18 U.S.C. § 16 [18 USCS § 16].

Petitioner immigrated to the United States in 1980 and became a lawful permanent resident in 1987. In January 2000, he was charged with two counts of DUI causing serious bodily injury under Fla. Stat. § 316 193(3)(c)(2), after he

caused an accident resulting in injury to two people. He pleaded guilty to both counts and was sentenced to two and a half years in prison.

In November 2000, while he was serving his sentence, the Immigration and Naturalization Service (INS) initiated removal proceedings against him pursuant to § 237(a) of the INA. Under that provision, "[a]ny alien who is convicted of an aggravated felony . . . is deportable" and may be removed upon an order of the Attorney General. 66 Stat 201, 3 U.S.C. § 1227(a)(2)(A)(iii) [8 USCS § 1227(a)(2)(A)(iii)]. Section 101(a)(43) of the INA defines "aggravated felony" to include, inter alia, "a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year."[1] 8 U.S.C. § 1101(a)(43)(F) [8 USCS § 1101(a)(43)(F)] (footnote omitted). Title 18 U.S.C. § 16 [18 USCS § 16], in turn, defines the term "crime of violence" to mean:

> "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> "(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

---

[1] Congress first made commission of an aggravated felony grounds for an alien's removal in 1988, and it defined the term to include offenses such as murder, drug trafficking crimes, and firearm trafficking offenses. See Anti-Drug Abuse Act of 1988, §§ 7342, 7344, 102 Stat. 4469, 4470. Since then, Congress has frequently amended the definition of aggravated felony, broadening the scope of offenses which render an alien deportable. See, e.g., Antiterrorism and Effective Death Penalty Act of 1996, § 440(e), 110 Stat. 1277 (adding a number of offenses to § 101(a)(43) of the INA); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), § 321, 110 Stat. 3009-627 (same). The inclusion of any "crime of violence" as an aggravated felony came in 1990. See Immigration Act of 1990, § 501, 104 Stat 4978, 5048.

Here, the INS claimed that petitioner's DUI conviction was a "crime of violence" under § 16, and therefore an "aggravated felony" under the INA.

In October 2001, an Immigration Judge found petitioner removable, relying upon the Eleventh Circuit's decision in *Le v. United States Attorney General*, 196 F.3d 1352 (1999) (*per curiam*), which held that a conviction under the Florida DUI statute qualified as a crime of violence. The BIA affirmed.[2] Petitioner completed his sentence and was removed to Haiti in November 2002. In June 2003, the Court of Appeals for the Eleventh Circuit dismissed petitioner's petition for review, relying on its previous ruling in *Le, supra*.[3] App. to Pet. For Cert. 5a-7a, We granted certiorari, 540 U.S. 1176, 540 U.S, 1176, 158 L. Ed. 2d 76, 124 S. Ct. 1405 (2004), to resolve a conflict among the Courts of Appeals on the question whether state DUI offenses similar to the one in Florida,

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[2] When petitioner first appealed, the BIA's position was that a violation of DUI statutes similar to Florida's counted as a crime of violence under 18 U.S.C. § 16 [18 USCS § 16]. See, e.g., *Matter of Puente-Salazar*, 22 I. & N. Dec. 1006, 1012-1013 (BIA 1999) (en banc). Before petitioner received a decision from his appeal (due to a clerical error not relevant here), the BIA in another case reversed its position from *Puente-Salazar* and held that DUI offenses that do not have a *mens rea* of at least recklessness are not crimes of violence within the meaning of § 16. See *Matter of Ramos*, 23 I. & N. Dec. 336, 346 (BIA. 2002) (en banc). However, because the BIA held in *Ramos* that it would "follow the law of the circuit in those circuits that have addressed the question whether driving under the influence is a crime of violence," *id.*, at 346-347, and because it found the Eleventh Circuit's ruling in *Le* controlling, it affirmed the Immigration Judge's removal order. See App. to Pet. for Cert. la-4a.

[3] Pursuant to the IIRIRA, the Eleventh Circuit was without jurisdiction to review the BIA's removal order in this case if petitioner was "removable by reason of having committed" certain criminal offenses, including those covered as an "aggravated felony." See 8 U.S.C. § 1252(a)(2)(C) [8 USCS § 1252(a)(2)(C)]. Because the Eleventh Circuit held that petitioner's conviction was such an offense, it concluded that it had no jurisdiction to consider the removal order.

which either do not have a *mens rea* component or require only a showing of negligence in the operation of a vehicle, qualify as a crime of violence. Compare *Le, supra*, at 1354; and *Omar v. INS*, 298 F.3d 710, 715-718 (CA8 2002), with *United States v. Trinidad-Aquino*, 259 F.3d 1140, 1145-1146 (CA9 2001); *Dalton v. Ashcroft*, 257 F3d 200, 205-206 (CA2 2001); *Bazan-Reyes v. INS*, 256 F.3d 600, 609-611 (CA7 2001); and *United States v, Chapa-Garza*, 243 F.3d 921, 926-927 (CA5), amended, 262 F.3d 479 (CA5 2001) (*per curiam*); see also *Ursu v. INS*, 20 Fed. Appx. 702 (CA9 2001) (following *Trinidad-Aquino, supra*, and ruling that a violation of the Florida DUI statute at issue here and in *Le* does not count as a "crime, of violence"). We now reverse the Eleventh Circuit.

* * * *

Title 18 U.S.C. § 16 [18 USCS § 16] was enacted as part of the Comprehensive Crime Control Act of 1984, which broadly reformed the federal criminal code in such areas as sentencing, bail, and drug enforcement, and which added a variety of new violent and nonviolent offenses. § 1001(a), 98 Stat 2136. Congress employed the term "crime of violence" in numerous places in the Act, such as for defining the elements of particular offenses, see, e.g., 18 U.S.C. § 1959 [18 USCS § 1959] (prohibiting threats to commit crimes of violence in aid of racketeering activity), or for directing when a hearing is required before a charged individual can be released on bail, see § 3142(f) (requiring a pretrial detention hearing for those alleged to have committed a crime of violence). Congress therefore provided in § 16 a general definition of the term "crime of violence" to be used throughout the Act. See § 1001(a), 98 Stat 2136. Section 16 has since been incorporated into a variety of statutory provisions, both criminal and noncriminal.[4]

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[4] For instance, a number of statutes criminalize conduct that has as an element the commission of a crime of violence under § 16. See, e.g., 18

Here, pursuant to § 237(a) of the INA, the Court of Appeals applied § 16 to find that petitioner's DUI conviction rendered him deportable. In determining whether petitioner's conviction falls within the ambit of § 16, the statute directs our focus to the "offense" of conviction. See § 16(a) (defining a crime of violence as "*an offense* that has *as an element* the use . . . of physical force against the person or property of another" (emphasis added)); § 16(b) (defining the term as "*any other offense* that is a felony and that, *by its nature*, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" (emphasis added)), This language requires us to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime.

Florida Stat. § 316.193(3)(c)(2) makes it a third-degree felony for a person to operate a vehicle while under the influence and, "by reason of such operation, caus[e] . . . [s]erious bodily injury to another." The Florida statute, while it requires proof of causation of injury, does not require proof of any particular mental state. See *State v. Hubbard*, 751 So. 2d 552, 562-564 (Fla. 1999) (holding, in the context of a DUI manslaughter conviction under § 316.193, that the statute does not contain a *mens rea* requirement), Many States have enacted similar statutes, criminalizing DUI causing serious bodily injury or death without requiring proof of any mental

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U.S.C. § 842(p) [18 USCS § 842(p)] (prohibiting the distribution of information relating to explosives, destructive devices, and weapons of mass destruction in relation to a crime of violence). Other statutory provisions make classification of an offense as a crime of violence consequential for purposes of, *inter alia*, extradition and restitution. See §§ 3181(b), 3663A(c). And the term "crime of violence" under § 16 has been incorporated into a number of noncriminal enactments. See, e.g., 8 U.S.C. § 1227(a)(2)(A)(iii) [8 USCS § 1227(a)(2)(A)(iii)] (rendering an alien deportable for committing a crime of violence, as petitioner is charged here).

state,[5] or, in some States, appearing to require only proof that the person acted negligently in operating the vehicle.[6] The question here is whether § 16 can be interpreted to include such offenses.

Our analysis begins with the language of the statute. See *Bailey v. United States*, 516 U.S. 137, 144, 133 L. Ed. 2d 472, 116 S. Ct. 501 (1995). The plain text of § 16(a) states that an offense, to qualify as a crime of violence, must have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." We do not deal here with an *attempted* or *threatened* use of force.

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[5] See, e.g., Ala. Code § 13A-6-20(a)(5) (West 1994); Colo. Rev. Stat. § 18-3-205(I)(b)(I) (Lexis 2003); Conn. Gen. Stat. § 53a-60d(a) (2003); Ga. Code Ann. § 40-6-394 (Lexis 2004); Idaho Code § 18-8006(1) (Lexis 2004); Ill. Comp, Stat. Ann., ch. 625, § 5/11-501(d)(1)(C) (West 2002); Ind. Code § 9-30-5-4 (1993); Iowa Code § 707.6A(4) (2003); Ky. Rev. Stat. Ann. §§ 189,4.010(1) and (11)(c) (Lexis Supp. 2004); Me. Rev. Stat. Ann., Tit. 29-A, § 2411(1-A)(D)(1) (West Supp. 2003); Mich. Comp. Laws § 257.625(5) (2001 and Supp. 2004); Neb. Rev. Stat. § 60-6, 198(1) (2002 Cum. Supp.); N. H. Rev. Slat. Ann. §§ 265:82-a(I)(b) and (II)(b) (West 2004); N. J. Stat. Ann. § 2C:12-1(c) (West Supp. 2003); N. M. Stat. Ann. §§ 66-8-101(B) and (C) (2004); N. D. Cent. Code § 39-09-01.2(1)(c) (Lexis 1987); Ohio Rev. Code Ann. § 2903.08(A)(1)(a) (Lexis 2003); Okla. Stat. Ann., Tit:. 47, § 11-904(B)(1) (West 2001); 75 Pa. Cons. Stat. § 3804(b) (Supp. 2003); R. I. Gen. Laws § 31-27-2.6(a) (Lexis 2002); Tex. Penal Code Ann. § 49.07(a)(1) (West 2003); Vt. Stat. Ann., Tit. 23, § 1210(f) (Lexis Supp. 2004); Wash. Rev. Code § 46.61.522(1)(b) (1994); Wis. Slat. § 940.25(1) (1999-2000); Wyo. Stat. § 31-5-233(h) (Lexis 2003).

[6] See, e.g., Cal. Veh. Code § 23153 (West 2000); Del. Code Ann., Tit. 11, §§ 628(2), 629 (Lexis 1995); La. Stat. Ann. §§ 14:39.1(A), 14:39.2(A) (West 1997 and Supp. 2004); Md. Crim. Law Code Ann., §§ 3-211(c) and (d) (Lexis 2004); Miss. Code Ann. § 63-11-30(5) (Lexis 2004); Mo. Ann. Stat. § 565.060.1(4) (West 2000); Mont. Code Ann. § 45-5-205(1) (2003); Nev. Rev. Stat. § 484.3795(1) (2003); S. C. Code Ann. § 56-5-2945(A)(1) (2003); S. D. Codified Laws § 22-16-42 (West Supp. 2003); Utah Code Ann. §§ 41-6-44(3)(a)(ii)(A) and (3)(b) (Lexis Supp. 2004); W. Va. Code § 17C-5-2(c) (Lexis 2004).

Petitioner contends that his conviction did not require the "use" of force against another person because the most common employment of the word "use" connotes the *intentional* availment of force, which is not required under the Florida DUI statute. The Government counters that the "use" of force does not incorporate any *mens rea* component, and that petitioner's DUI conviction necessarily includes the use of force. To support its position, the Government dissects the meaning of the word "use," employing dictionaries, legislation, and our own case law in contending that a use of force may be negligent or even inadvertent.

Whether or not the word "use" alone supplies a *mens rea* element, the parties' primary focus on that word is too narrow. Particularly when interpreting a statute that features as elastic a word as "use," we construe language in its context and in light of the terms surrounding it. See *Smith v. United States*, 508 U.S. 223, 229, 124 L. Ed. 2d 138, 113 S. Ct. 2050 (1993); *Bailey, supra*, at 143, 133 L. Ed. 472, 116 S. Ct. 501. The critical aspect of § 16(a) is that a crime of violence is one involving the "use . . . of physical force *against the person or property of another*." (Emphasis added.) As we said in a similar context in *Bailey*, "use" requires active employment. 516 U.S., at 145, 133 L. Ed. 2d 138, 113 S. Ct. 501. While one may, in theory, actively employ *something* in an accidental manner, it is much less natural to say that a person actively employs physical force against another person by accident. Thus, a person would "use . . . physical force against" another when pushing him; however, we would not ordinarily say a person "use[s] . . . physical force against" another by stumbling and falling into him, When interpreting a statute, we must give words their "ordinary or natural" meaning. *Smith, supra*, at 228, 124 L. Ed. 2d 138, 113 S. Ct. 2050. The key phrase in § 16(a)—the "use . . . of physical force against the person or property of another"—most naturally suggests a higher degree of intent than negligent or merely accidental conduct. See *United States v. Trinidad-*

Aquino, 259 F3d, at 1145; *Bazan Reyes v. INS*, 256 F.3d, at 609. Petitioner's DUI offense therefore is not a crime of violence under § 16(a).

Neither is petitioner's DUI conviction a crime of violence under § 16(b), Section I 6(b) sweeps more broadly than § 16(a), defining a crime of violence as including "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." But § 16(b) does not thereby encompass all negligent misconduct, such as the negligent operation of a vehicle. It simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense. The reckless disregard in § 16 relates nor to the general conduct or to the possibility that harm will result from a person's conduct, but to the risk that the use of physical force against another might be required in committing a crime.[7] The classic example is burglary. A burglary would be covered under § 16(b) *not* because the offense can be committed in a generally reckless way or because someone may be injured, but because burglary, by its nature, involves a substantial risk

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[7] Thus, § 16(b) plainly does not encompass all offenses which create a "substantial risk' that injury will result from a person's conduct. The "substantial risk" in § 16(b) relates to the use of force, not to the possible effect of a person's conduct. Compare § 16(b) (requiring a "substantial risk that physical force against the person or property of another may be used"), with United States Sentencing Commission, Guidelines Manual § 4B1.2(a)(2) (Nov. 2003) (In the context of a career-offender sentencing enhancement, defining "crime of violence" as meaning, *inter alia*, "conduct that presents a serious potential risk of physical injury to another"). The risk that an accident may occur when an individual drives while intoxicated is simply riot the same thing as the risk that the individual may "use" physical force against another in committing the DUI offense. See, e.g., *United States v. Lucio-Lucio*, 347 F.3d 1202, 1205-1207 (CA10 2003); *Bazan-Reyes, v. INS*, 256 F.3d 600. 609-610 (CA7 2001).

that the burglar will use force against a victim in completing the crime.

Thus, while § 16(b) is broader than § 16(a) in the sense that physical force need not actually be applied, it contains the same formulation we found to be determinative in § 16(a): the use of physical force against the person or property of another. Accordingly, we must give the language in § 16(b) an identical construction, requiring a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense. This is particularly true in light of § 16(b)'s requirement that the "substantial risk" be a risk of using physical force against another person "in the course of committing the offense." In no "ordinary or natural" sense can it be said that a person risks having to "use" physical force against another person in the course of operating a vehicle while intoxicated and causing injury.

In construing both parts of § 16, we cannot forget that we ultimately are determining the meaning of the term "crime of violence." The ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses. Cf. *United States v. Doe*, 960 F.2d 221, 225 (CA1 1992) (Breyer, C. J.) (observing that the term "violent felony" in 18 U.S.C. § 924(e) (2000 ed. and Supp. II) [18 USCS § 924(e)] "calls to mind a tradition of crimes that involve the possibility of more closely related, active violence"). Interpreting § 16 to encompass accidental or negligent conduct would blur the distinction between the "violent" crimes Congress sought to distinguish for heightened punishment and other crimes. See *United States v. Lucio-Lucio*, 347 F.3d 1202, 1205-1206 (CA10 2003).

Section 16 therefore cannot be read to include petitioner's conviction for DUI causing serious bodily injury under

Florida law.[8] This construction is reinforced by Congress' use of the term "crime of violence" in § 101(h) of the INA, which was enacted in 1990. See Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, § 131, 104 Stat. 31 (hereinafter FRAA). Section 212(a)(2)(E) of the INA renders inadmissible any alien who has previously exercised diplomatic immunity from criminal jurisdiction in the United States after committing a "serious criminal offense." 8 U.S.C. § 1182(a)(2)(E) USCS § 1182(a)(2)(E)]. Section 101(h) defines the term "serious criminal offense" to mean:

Congress' separate listing of the DUI-causing-injury offense from the definition of "crime of violence" in § 16 is revealing. Interpreting § 16 to include DUI offenses, as the Government urges, would leave § 101(h)(3) practically devoid of significance. As we must give effect to every ward of a statute wherever possible, see *Duncan v. Walker*, 533 U.S. 167, 174, 150 L. Ed. 2d 251, 121 S. Ct. 2120 (2001), the dis-

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[8] Even if § 16 lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute in petitioner's favor. Although here we deal with § 16 in the deportation context, § 16 is a criminal statute, and it has both criminal and noncriminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies. Cf. *United States v. Thompson/Center Arms Co.*, 504 US. 505, 517-518, 119 L. Ed 2d 308, 112 S. CL 2102 (1992) (plurality opinion) (applying the rule of lenity to a tax statute, in a civil setting, because the statute had criminal applications and thus had to be interpreted consistently with its criminal applications).

"(1) any felony;

"(2) any crime of violence, as defined in section 16 of title 18; or

"(3) any crime of reckless driving or of driving while intoxicated or under the influence of alcohol or of prohibited substances if such crime involves personal injury to another." 8 U.S.C. § 1101(h) [8 USCS 1101(h)] (emphasis added).

tinct provision for these offenses under § 101(h) bolsters our conclusion that § 16 does not itself encompass DUI offenses.[9]

This case does not present us with the question whether a state or federal offense that requires proof of the *reckless* use of force against a person or property of another qualifies as a crime of violence under 18 U.S.C. § 16 [18 USCS § 16] DUI statutes such as Florida's do not require any mental state with respect to the use of force against another person, thus reaching individuals who were negligent or less. Drunk driving is a nationwide problem, as evidenced by the efforts of legislatures to prohibit such conduct and impose appropriate penalties. But this fact doe not warrant our shoehorning it into statutory section where it does not fit. The judgment of the United States Court of Appeals for the Eleventh Circuit is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[9] This point carries significant weight in the particular context of this case. Congress incorporated § 16 as an aggavated felony under § 101(a)(43)(F) of the INA in 1990. See Immigration Act of 1990, § 501, 104 Stat 5048 (Nov. 29, 1990). Congress enacted § 101(h), with its incorporation of § 16 and a separate provision covering DUI-causing-injury offenses, just nine months earlier. See FRAA, § 131, 104 Stat. 31 (Feb. 16, 1990). That Congress distinguished between a crime of violence and DUI-causing-injury offenses (and included both) in § 101(f), but did not do so shortly thereafter in making only a crime of violence an aggravate (felony under § 101(a)(43)(F), strongly support our construction of § 16.

JUL 2 3 2007

No. 06-1415

In the Supreme Court of the United States

JESUS DE LA PAZ SANCHEZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether unauthorized use of a motor vehicle, in violation of Tex. Penal Code § 31.07 (West 1992), is a "crime of violence" under 18 U.S.C. 16(b).

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In the Supreme Court of the United States

No. 06-1415

JESUS DE LA PAZ SANCHEZ, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6a-7a) is reported at 473 F.3d 133. The most recent decisions of the Board of Immigration Appeals (App., *infra*, 1a-2a) and the immigration judge (Pet. App. 1a-4a) are unreported. A prior order of the court of appeals (App., *infra*, 3a-4a) is unreported. Prior decisions of the Board of Immigration Appeals (Pet. App. 5a; App., *infra*, 5a-6a, 7a-9a) and the immigration judge (App., *infra*, 10a-16a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 2006. The petition for a writ of certiorari was filed on February 13, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Mexico. In July 1985, he was admitted to the United States as an immigrant. In November 1992, he committed the offense of unauthorized use of a motor vehicle, in violation of Tex. Penal Code § 31.07 (West 1992). In May 1996, he was convicted of that offense and sentenced to one year in jail. Admin. R. 286; Pet. App. 2a; App., *infra*, 11a, 14a.

The Immigration and Naturalization Service (INS) subsequently commenced removal proceedings against petitioner. Admin. R. 286.[1] As relevant here, the INS alleged that petitioner was removable pursuant to 8 U.S.C. 1227(a)(2)(A)(iii), because the offense of unauthorized use of a motor vehicle was a "crime of violence" under 18 U.S.C. 16 for which the prison term was at least one year, and the offense was therefore an "aggravated felony" under 8 U.S.C. 1101(a)(43)(F). Admin. R. 286. Under 18 U.S.C. 16(b), the provision at issue here, the term "crime of violence" means "any * * * offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

2. The immigration judge (IJ) held that, under Fifth Circuit precedent, "unauthorized use of a [motor] vehicle [i]s a crime of violence and an aggravated felony." App., *infra*, 14a. The IJ therefore ruled that petitioner was removable on that ground (as well as on the basis of

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[1] The INS's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. IV 2004).

another prior conviction). *Id.* at 11a-14a. The IJ also determined that petitioner was ineligible for various forms of relief and ordered him removed to Mexico. *Id.* at 14a-16a.

The Board of Immigration Appeals (BIA) agreed with the IJ that unauthorized use of a motor vehicle is a "crime of violence" and (because petitioner received a one-year jail term) an aggravated felony. App., *infra*, 8a (citing *United States* v. *Galvan-Rodriguez*, 169 F.3d 217 (5th Cir.), cert. denied, 528 U.S. 837 (1999)). The BIA also agreed with the IJ that petitioner was ineligible for relief, and therefore dismissed petitioner's appeal (except insofar as it held that the IJ erred in finding that petitioner was removable on the basis of the other prior conviction). *Id.* at 7a-9a. The BIA subsequently granted petitioner's motion to reconsider, however, and remanded the case to the IJ. *Id.* at 5a-6a. The BIA held that, contrary to its initial decision, the record demonstrated that petitioner had pleaded guilty to unauthorized use of a motor vehicle (rather than having been found guilty of that offense at trial), and that petitioner might therefore be eligible for a waiver of inadmissibility under former Section 212(c) of the Immigration and Nationality Act, 8 U.S.C. 1182(c) (1994) (repealed 1996), as a result of this Court's decision in *INS* v. *St. Cyr*, 533 U.S. 289 (2001). App., *infra*, 5a-6a.

On remand, the IJ found that petitioner was ineligible for a waiver of inadmissibility because there is no parallel ground of exclusion for the offense of unauthorized use of a motor vehicle. Pet. App. 1a-4a. The BIA agreed with the IJ and dismissed petitioner's appeal. *Id.* at 5a. After the court of appeals remanded the case on joint motion of the parties, App., *infra*, 3a-4a, the BIA "f[ou]nd no reason to disturb [its] previous decision

to find [petitioner] removable as charged and ineligible for a waiver of inadmissibility," *id.* at 2a. The BIA therefore dismissed petitioner's appeal. *Id.* at 1a-2a.

3. The court of appeals denied petitioner's petition for review. Pet. App. 6a-7a. It rejected petitioner's contention that the Texas offense of unauthorized use of a motor vehicle is not a "crime of violence" under 18 U.S.C. 16(b), finding the claim foreclosed by its decision in *Galvan-Rodriguez, supra.* Pet. App. 7a. The court also rejected petitioner's contention that he was eligible for a waiver of inadmissibility. *Ibid.*[2]

ARGUMENT

Petitioner renews his contention (Pet. 3-4) that the Texas offense of unauthorized use of a motor vehicle is not a "crime of violence" under 18 U.S.C. 16(b). The IJ, BIA, and court of appeals all correctly rejected that contention, and further review is unwarranted.

A person commits the offense of unauthorized use of a motor vehicle if he "intentionally or knowingly operates another's * * * motor-propelled vehicle without the effective consent of the owner." Tex. Penal Code § 31.07(a) (West 1992). At the time petitioner committed that offense, it was a "felony of the third degree," *id.* § 31.07(b); at the time he was sentenced, it was a "state jail felony," *id.* § 31.07(b) (1995).[3] An offense is a "crime

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[2] Petitioner does not seek review of the court of appeals' holding that he is ineligible for a waiver of inadmissibility.

[3] A felony of the third degree was punishable by between two and ten years in "the institutional division of the Texas Department of Criminal Justice" or by a maximum of one year in "a community correctional facility." Tex. Penal Code § 12.34(a) (West 1992). A state jail felony was punishable by between 180 days and two years in "a state jail." *Id.* § 12.35(a) (1995).

of violence" under 18 U.S.C. 16(b) if it is "a felony" that, "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Petitioner does not dispute that the Texas offense of unauthorized use of a motor vehicle is a felony. But he argues that the offense "does not involve a substantial risk of physical force against the property of another in the commission of a felony." Pet. 3. That argument lacks merit and does not warrant review by this Court.

In *United States* v. *Galvan-Rodriguez*, 169 F.3d 217, cert. denied, 528 U.S. 837 (1999), the decision on which it relied here, the Fifth Circuit correctly held that the unauthorized use of a motor vehicle involves a substantial risk of the use of physical force against the property of another because the offense "carries a substantial risk that the vehicle might be broken into, 'stripped,' or vandalized." *Id.* at 219. Contrary to petitioner's assertion (Pet. 3-4), *Galvan-Rodriguez* is consistent with this Court's subsequent decision in *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), which held that the use of physical force contemplated by 18 U.S.C. 16(b) "requir[es] a higher *mens rea* than * * * merely accidental or negligent conduct," 543 U.S. at 11. Since *Galvan-Rodriguez* relied on the risk that the vehicle would be broken into, "stripped," or vandalized, and since such conduct is intentional, not accidental or negligent, *Galvan-Rodriguez* is "fully consistent" with *Leocal*, as the Fifth Circuit has recently held. *Brieva-Perez* v. *Gonzales*, 482 F.3d 356, 361 (5th Cir. 2007). Petitioner cites no decision of any court of appeals—either before *Leocal* or after—holding that unauthorized use of a motor vehicle is not a "crime of violence" under 18 U.S.C. 16(b), and we are not aware of any.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
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Attorneys

JULY 2007

APPENDIX A

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A39 718 293 - Houston Date: [Oct. 04, 2005]

In re: JESUS DE LA PAZ-SANCHEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Gino M. Mesa, Esquire

ON BEHALF OF DHS:
Gerrie Zhang, Assistant Chief Counsel

ORDER:

PER CURIAM. The United States Court of Appeals for the Fifth Circuit has remanded the record to this Board, upon joint motion of the parties, for supplementary briefs. Upon review of the parties' further briefing, we agree with the Department of Homeland Security that our recent decision in *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005), controls the respondent's case. *See*

also Ramirez v. Ashcroft, 361 F. Supp. 2d 650 (S.D. Tex. 2005). As such, we find no reason to disturb our previous decision to find the respondent removable as charged and ineligible for a waiver of inadmissibility pursuant to section 212(c) of the Act. Accordingly, the appeal is dismissed.

/s/ ILLEGIBLE
FOR THE BOARD

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-60880

JESUS DE LA PAZ SANCHEZ, PETITIONER

v.

JOHN ASHCROFT, US ATTORNEY GENERAL,
RESPONDENT

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

[Filed: Dec. 29, 2004]

Before DAVIS, SMITH, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the joint motion of the parties to remand petition is [GRANTED].

IT IS FURTHER ORDERED that the joint motion of the parties to dismiss petition is [GRANTED].

IT IS FURTHER ORDERED that the joint motion of the parties to hold petition in abeyance is [denied as unnecessary].

IT IS FURTHER ORDERED that the joint alternative motion of the parties for an extension of ten days after disposition of pending motions in which to file the administrative record is [denied as unnecessary].

/s/ ILLEGIBLE

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A39-718-293 - Houston Date: [Sept. 10, 2002]

In re: DE LA PAZ SANCHEZ, JESUS

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

ORDER:

PER CURIAM. The respondent moves the Board pursuant to 8 C.F.R. § 3.2 to reconsider our decision dated July 16, 2002. The respondent contends that the Board erred in finding that he was not eligible for a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, pursuant to INS v. St. Cyr, 533 U.S. 289 (2001), because he was found guilty and had not pled guilty to unauthorized use of a motor vehicle. The respondent asserts that he pled guilty on May 14, 1993, but was re-sentenced on May 23, 1996, due to probation violations. The conviction records (Exh. 2, at tab B) support the respondent's claim that he was placed on community supervision on May 14, 1993, and

that he was re-sentenced on May 23, 1996, due to probation violations. In this regard, we note that, in Texas, a sentence to community supervision occurs upon a plea of guilty and results in a deferred adjudication. The Service has filed no response to the respondent's motion and thus, does not dispute the respondent's statements regarding his conviction. We therefore find that a remand is warranted in the present case in order to allow the respondent an opportunity to apply for a section 212(c) waiver.

Accordingly, the motion is *granted*, the proceedings are reopened, and the record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion.

/s/ ILLEGIBLE
FOR THE BOARD

APPENDIX D

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A39 718 293 - Houston Date: [July 16, 2002]

In re: JESUS DE LA PAZ SANCHEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Gino M. Mesa, Esq.

ON BEHALF OF SERVICE:

Cara Wilkins, Assistant District Counsel

ORDER:

PER CURIAM. The appeal is sustained in part as a result of the presently controlling decisions of the United States Court of Appeals for the Fifth Circuit in *United States v. Hernandez-Avalos*, 251 F.3d 505 (5th Cir. 2001) and *United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001). *See Matter of Olivares-Martinez*, 23 I&N Dec. 148 (BIA 2001). Therefore, we find that the respondent is not removable as a result of his conviction for driving while intoxicated.

However, the respondent still has a conviction, dated May 23, 1996, for unauthorized use of a motor vehicle, for which he was sentenced to one year confinement (Exh. 2). This offense constitutes a crime of violence for which the term of imprisonment was one year and thus is an aggravated felony. *See* section 101(a)(43)(F); *See U.S. v. Galvan-Rodriguez*, 169 F.3d 217 (5th Cir. 1999).

On appeal, the respondent contends that he is eligible for relief under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). While this appeal has been pending, the United States Supreme Court determined that the restrictions on section 212(c) relief do not apply retroactively to aliens who entered into a plea agreement prior to April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. *See INS v. St. Cyr*, 289 U.S. 533 (2001). However, this alien is not aided by the Supreme Court's *St. Cyr* ruling. The record reflects that the respondent is not eligible for section 212(c) relief because the alien did not enter into a plea agreement, but rather was tried and found guilty of the crime which provides the basis for these proceedings.

The respondent also maintains that he is eligible for cancellation of removal. Because the respondent has been convicted of an aggravated felony, he is ineligible for cancellation of removal. *See* section 240A(a)(3) of the Act.

We also note that we are without authority to entertain the respondent's arguments regarding the constitutionality of the statute rendering him removable. *See Matter of C-*, 20 I&N 529, 532 (BIA 1992).

Accordingly, the appeal is sustained in part and dismissed in part.

/s/ ILLEGIBLE
FOR THE BOARD

APPENDIX E

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Houston, Texas

File No.: A 39 718 293

IN THE MATTER OF
JESUS DE LA PAZ SANCHEZ, RESPONDENT

IN REMOVAL PROCEEDINGS

Nov. 2, 2000

CHARGE:	Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act as amended [aggravated felony/ crime of violence]
APPLICATIONS:	Cancellation of removal and adjustment of status under Sections 240A(b)(1) and 245(a) of the Immigration and Nationality Act as amended.

ON BEHALF OF RESPONDENT:

Laura Arteaga, Esquire
7457 Harwin, Suite 260
Houston, Texas 77036

ON BEHALF OF SERVICE:

Cara Wilkins, Assistant District Counsel
Houston, Texas

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a native and citizen of Mexico, born November 4, 1964. He is approximately 36 years of age.

The Service issued a Notice to Appear, dated June 9, 2000. The respondent appeared with counsel today, November 2, 2000, admitted the allegations on the Notice to Appear but denied the charge under Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act as amended (the Act).

The issues before this Court are whether the respondent is subject to removal, under Section 237(a)(2)(A)(iii) of the Act and whether the respondent is eligible for relief from removal.

The respondent agrees that he was convicted for driving while intoxicated on April 8th, 1997, in Harris County, Texas. Respondent has also admitted that he was convicted for unauthorized use of a vehicle on May 23, 1996, in Harris County, Texas.

The Service asserts that both driving while intoxicated and unauthorized use of a vehicle are aggravated felonies under Section 101(a)(43)(F) of the Act. With

regard to the driving while intoxicated offense, the Service relies on *In re Magallanes*, Int. Dec. 3341 (BIA 1998).

The Service provided a charging instrument relating to the respondent's conviction for driving while intoxicated. The indictment relating to the respondent's April 8th, 1997, conviction for driving while intoxicated alleges the respondent:

> On or before November 5, 1996, did then and there unlawfully while intoxicated, namely not having the normal use of his mental and physical faculties, by reason of the introduction of alcohol into his body operate a motor vehicle in a public place. [Enhancement paragraphs omitted].

The state of Texas defines driving while intoxicated as follows:

> A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place.

See Section 49.04(a) of the Texas Penal Code. Intoxicated means:

> (A) Not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, a dangerous drug, a combination of two or more of those substances or any other substance into the body; or
>
> (B) Having an alcohol concentration of 0.10 or more.

See Section 49.01(2) of the Texas Penal Code.

The Board of Immigration Appeals (the Board) determined that driving while intoxicated under the influence of intoxicating liquor, any drug or toxic substance or any other combination of such substances was a crime of violence (18 U.S.C. 16b); and qualifies as an aggravated felony because an Arizona criminal Court sentenced Magallanes to 2 and 1/2 years in prison.

The description of Magallanes' offense as aggravated and Magallanes' driving with his license suspended did not create the risk which justified the Board's classification of Magallanes' offense as an aggravated felony under Section 101(a)(43) of the Act. The Board justified classification of Magallanes' offense as an aggravated felony based on the risk of personal injury, death and damage to property inherent in driving a vehicle while intoxicated under Arizona law.

The respondent has failed to meaningfully distinguish the offense considered in *In re Magallanes*, from the driving while intoxicated offense committed by the respondent. The difference between driving a vehicle under Arizona law and operating a vehicle under Texas law, is not significant for purposes of evaluating the risk of such activity conducted under the influence of liquor or other drugs.

This Court is bound by precedent decisions of the Board. *See* 8 C.F.R. 3.1(g). Based on *In re Magallanes*, the respondent's offense for driving while intoxicated under Texas law must be classified as an aggravated felony.

With regard to the respondent's offense of unauthorized use of the vehicle, the Fifth Circuit Court of Ap-

peals has recognized unauthorized use of a vehicle as a crime of violence and an aggravated felony (citation omitted).

This Court is bound by precedent decisions of the Fifth Circuit which is a circuit in which the Immigration Court sits.

Based on the Board precedent and of the precedent in the Fifth Circuit Court of Appeals, both of the respondent's offenses are aggravated felonies. In addition, both of these offenses occurred subsequent to the respondent's admission as an immigrant on July 18, 1985.

All of the elements required for the charge under Section 237(a)(2)(a)(iii) of the Act in conjunction with Section 101(a)(43)(F) of the Act are present. The charge under Section 237(a)(2)(A)(iii) of the Act is sustained.

The respondent has applied for cancellation of removal under Section 240A(a) of the Act. Among other criteria, an applicant for relief under Section 240(a)(A) of the Act, must establish that he or she has not been convicted for an aggravated felony defined under Section 101(a)(43) of the Act.

Since respondent has been convicted for two aggravated felonies, he is not eligible for relief under Section 240(a)(A) of the Act.

The respondent has also requested adjustment of status, under Section 245(a) of the Act, in conjunction with a waiver, under Section 212(h) of the Act.

There is no controversy over whether the respondent requires a waiver, because he has been sentenced before to more than one offense for which the aggregate sen-

tences of confinement were five years or more. *See* Section 212(a)(2)(B) of the Act.

A lawful permanent resident of the United States is not eligible for a 212(h) waiver, if the alien has been convicted for an aggravated felony defined under Section 101(a)(43) of the Act. *See* Section 212(h)(2) of the Act. Under these circumstances, the respondent is not eligible for adjustment because he cannot qualify for the required waiver under Section 212(h) of the Act.

The respondent has not identified any other form of relief. He does not appear to be eligible for any form of relief. This leaves no alternative other than to issue an order of removal to the respondent's native country of Mexico.

ORDER

IT IS ORDERED that the respondent's application for cancellation of removal under Section 240A(a) of the Immigration and Nationality Act as amended is denied.

IT IS FURTHER ORDERED that the respondent's application for adjustment of status under Section 245(a) of the Immigration and Nationality Act as amended is denied.

IT IS FURTHER ORDERED that the respondent's application for a waiver under Section 212(h) of the Immigration and Nationality Act as amended is denied.

IT IS FURTHER ORDERED that the respondent be removed to Mexico under Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act as amended.

/s/ WILLIAM K. ZIMMER
WILLIAM K. ZIMMER
Immigration Judge